No. 15949

# In the United States Court of Appeals For the Ninth Circuit

THE GREYHOUND CORPORATION,
*Appellant,*

VS.

JUANITA JEAN BLAKLEY, a Minor, by Her Guardian Ad Litem, Sidney W. Blakley,
*Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

## BRIEF OF APPELLANT

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## EXHIBITS

| Exhibit No. | Nature of Exhibit | Identified Page No. | Offered Page No. | Received Page No. | Rejected Page No. |
|---|---|---|---|---|---|
| 1 | Greyhound Lines witness report of accident of Karen Gilbertson | 105 | 106 | 106 | |
| 2 | Greyhound Lines witness report of accident of Patti Murphy | 138 | 812 | 813 | |
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| 78 | School record of Juanita Blakley | 1314 | 1321 | 1321 | |
| 79 | State college grade record | 1389 | 1389 | 1389 | |

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# BRIEF OF APPELLANT

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## JUDGMENT BELOW

The judgment and the verdict upon which the judgment was entered by the District Court are on pages 52 and 45 of the Transcript of Record.

## JURISDICTION

The appellee, plaintiff below, is a resident of the State of Washington. The appellant is a corporation of the State of Deleware. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00. The jurisdiction of this court is based upon diversity of citizenship, 28 U.S.C.A., Section 1332, June 25, 1948, C. 646 (62 Stat. 930) and the appellate

powers conferred by 28 U. S. C. A., Sections 1291 and 1294, June 25, 1948, C. 646 (62 Stat. 929, 930).

Under the pleadings as amended by the pre-trial order (which provides that the pleadings pass out of the case) appellee brought suit against appellant for damages for personal injuries allegedly sustained while riding as a fare paying passenger on one of the appellant's buses, on the evening of November 20, 1955, and obtained a verdict in the amount of $78,097.50 (R. 45).

## QUESTIONS PRESENTED

Juanita Jean Blakley (the appellee) was traveling by Greyhound Bus from Spokane, Washington, to Pullman, Washington, on November 20, 1955, after spending the weekend in Spokane visiting with friends and shopping, returning to her sorority at Washington State College. Shortly after boarding the bus she became ill and at Colfax (61 miles from Spokane, R. 1109) was removed from the bus and taken to a hospital from which she was discharged as cured the following morning, having been diagnosed as having hysteria (R. 969; Ex. 64). She returned to W. S. C. and continued her studies, including modern dancing, in which she got good grades. About six months later a diagnosis was made that she suffered from carbon monoxide poisoning resulting in brain damage and an affliction similar to, if not epilepsy.

The bus in question was what is known as a "Silversides" bus and had a capacity load consisting of 37 pas-

sengers and a driver. It was powered by a diesel engine, not gasoline, which is important in this case. As the bus approached Spangle (18 miles out of Spokane) plaintiff and others noticed fumes in the rear of the bus. The bus driver stopped the bus shortly after the first complaint at Cashup, permitting the plaintiff and others to step out for a few moments of fresh air, went back in the bus and opened up the windows. The four girls riding in the back seat moved forward but the plaintiff was the last one to come forward. The other passengers noticed nothing or satisfied themselves by opening their windows partially. No other passenger had a serious complaint. None developed the symptoms which Miss Blakley purportedly exhibited six months later.

The bus was powered with a General Motors diesel engine; the fuel used by the bus was diesel oil, not gasoline. There is a substantial body of evidence that a diesel engine does not produce carbon monoxide except under adverse conditions, when it produces what might be called less than traces—no significant quantity (R. 912-915). Tests on the same bus (Y515) on which Miss Blakley rode thoroughly established that fact here (R. 1149).

The first issue is whether or not there was sufficient evidence to go to the jury on the question, was there carbon monoxide within the bus which caused Miss Blakley to suffer carbon monoxide poisoning and consequent brain damage. Even if the doctrine of *res ipsa loquitur* applies, the presence of carbon monoxide on

the bus would have to be shown with reasonable probability before the presumption would arise that the presence of an unsafe quantity of carbon monoxide was through the negligence of the appellant.

The second issue is whether under the circumstances of this case the doctrine of *res ipsa loquitur* does in fact apply. The classic example of *res ipsa loquitur* is the imputation of negligence to the owner of a warehouse when a barrel of flour rolls out of an upper story of the warehouse and hits a pedestrian who is walking on the sidewalk in front of the warehouse. In such a case, negligence is presumed and the warehouseman must have shown that the barrel of flour fell without negligence on his part. But it is to be noted that it must be shown that the pedestrian was hit with the barrel of flour. Should the pedestrian wake up on the sidewalk and see no barrel of flour and no one else saw a barrel of flour, the presumption does not go so far as to supply the fact that there was a barrel of flour or the fact that the barrel did hit him on the head. So here, there must be proof of carbon monoxide on the bus in unsafe quantities before the doctrine of *res ipsa loquitur* creates the presumption that such carbon monoxide was present through negligence of the defendant. The presumption cannot put carbon monoxide in the bus any more than it can create the barrel of flour in the classic example cited.

The third question presented is whether or not the trial court erred in withdrawing from the considera-

tion of the jury the question of contributory negligence, assumption of risk and failure to mitigate damages. The evidence was clear that the bus was loaded and that practically all of the individuals on board the bus opened the windows or moved forward and that Miss Blakley after the first notice of fumes (shortly out of Spokane) failed to move forward, failed to go by an open window for over 45 minutes. The evidence is also clear and the plaintiff has admitted that she did not see a doctor for treatment after being discharged from the Colfax hospital for a period of over six months. Had she done so, her purported condition might have been mitigated.

The fourth question relates to the amount of the verdict: it is so excessive as to be unmistakeably the result of passion and prejudice. The plaintiff was, after November 20, 1955, and is, able to work, get married and enjoy life. For example (all subsequent to November 20, 1955), after completion of her first year in college, she worked for about a year at General Electric in Richland. She left her work in September, 1957, shortly before she expected this case to come to trial. The recorded interview of September 27, 1957, concerning her termination of employment, with Z. D. Wood, employment manager for General Electric at Richland, states "Will attend legal proceedings involving personal injury, later to be married and move from area." In Mr. Wood's own handwriting, "Has a civil suit pending. When this is settled, she will be married

and leave this area. Enjoyed work very much." (Ex. 56, R. 861).

## STATEMENT OF THE CASE

Juanita Jean Blakley, a young lady attending Washington State College, was enrolled as a Freshman and was pledged to Chi Omega Sorority. During the week immediately preceding November 20, 1955, Juanita Blakley had called her mother and requested to have permission to attend the University of Washington-W. S. C. football game at Seattle that weekend. Her mother refused her permission and instead of going to Seattle the plaintiff spent the weekend in Spokane with some friends. She went with Karen Gilbertson from her Sorority but did not stay overnight with that girl, going elsewhere, joining her friend just before the time to take the bus back to Pullman, Sunday evening, November 20, 1955 (R. 75). The bus in question had been assigned to the route from Spokane to Lewiston, Idaho, and return via Cashup, Colfax, and Pullman. The trip in from Lewiston to Spokane was uneventful and although the bus was loaded there were no complaints (R. 1088). At the appointed time, approximately 6:00 p.m., the bus loaded at the Spokane terminal but did not leave for approximately an hour, awaiting students who were coming from Seattle who had attended the game (R. 1089). The connecting bus was approximately one hour late. After these additional students had

boarded the bus, the bus left Spokane, with the plaintiff and her friends in the rear seat (R. 76). At the outskirts of Spokane the girls in the rear seat stated they noticed fumes (R. 77). One of the girls came forward, talked to the driver stating that the rear of the bus was hazy; but this was not until the bus reached Cashup almost an hour out of Spokane (R. 1109), where the highway on which the bus was driving was a very narrow two-lane highway with deep ditches on either side. The driver proceeded to the nearest cross road which was Cashup and pulled off of the highway (R. 1111). He let two or three of the girls out of the bus to stand on the shoulder while he checked the bus. Since a few of the other passengers also noticed fumes he opened up the windows and asked the girls to sit down front (R. 1111). Instead of sitting there they returned to the back of the bus but a short time later came forward, one of the passengers giving the plaintiff her seat (R. 78). Shortly thereafter, the plaintiff began gasping and throwing herself about (R. 80). One of the witnesses described her actions as hysterical (R. 1175). The bus driver arranged to take her to the Colfax hospital. Dr. William Freeman examined her upon arrival, put her to bed, diagnosing her condition as hysteria (R. 969). She checked out of the hospital the next day and made her way to the W. S. C. campus. The doctor's report showed that he had ruled out carbon monoxide poisoning and showed that her entering and her final diagnosis was hysteria (R. 969). The doctor had interned

at Cook County Hospital, Chicago, and was very familiar with carbon monoxide poisoning, having observed many cases there. Neither her breathing nor her complexion nor her reflexes which are three universal characteristics of CO poisoning indicated to the doctor that there was carbon monoxide poisoning.

The girl went back to her classes and continued on with normal work. In fact her actual grade record which is in evidence indicates that her grades improved rather than went downhill. Likewise, she continued studying modern dance, actively participating in sorority affairs, having many dates as she was and is a very attractive girl. During the trial one of the plaintiff's doctors demonstrated one of the effects of carbon monoxide was the loss of the reflex action of her knee. Her knee was tapped just below the kneecap. With a normal person there is an immediate and familiar reaction. In her instance there was no reaction. Plaintiff's doctor stated that this was one of the evidences of carbon monoxide poisoning. However, the medical history of the girl and an examination which was made of her at the time of her entry into Pullman prior to the ride on the bus November 20, 1955, disclosed that the doctor making the examination noticed that she had hyporeflexia. That is, lack of reflex action. Whatever it was that caused the lack of reflexes, whether it was carbon monoxide or some other cause, that cause occurred long before the ride on November 20, 1955 (R. 836-837).

Along in December, and during the Christmas vacation, the plaintiff's father endeavored to have the Greyhound Company pay the hospital bill at Colfax, and had Miss Blakley examined by a local doctor, but not for treatment (R. 1131). This doctor found nothing wrong with her; and it is interesting to note that her going to this doctor was at the request of her attorney, rather than upon the advice of any person or because the family felt in need of medical attention (R. 1131). Her lawyer then had her see a psychiatrist in Spokane, Dr. Southcombe. This doctor examined her on two or three occasions and referred her to Dr. Jones whereupon she was given an electroencephalograph. In June of 1956 approximately nine months after the bus ride in question, the doctor diagnosed her condition as being an epileptic process due to carbon monoxide poisoning. He subsequently prescribed thereafter several medicines which according to the plaintiff's mother have had a quieting effect upon the plaintiff and have controlled her "episodes."

The court submitted the case to the jury, denying the defense motions and a verdict was returned against the defendant in the sum of $78,097.50 (R. 45). Thereafter, defendant filed a motion for judgment notwithstanding the verdict of the jury or in the alternative for a new trial. Both motions were denied and judgment was entered (R. 52).

## SPECIFICATIONS OF ERRORS RELIED UPON IN THIS APPEAL

**1.**

The District Court erred in failing to grant appellant's motion challenging the sufficiency of the evidence and for dismissal at the close of appellee's case upon the ground and for the reason there was no evidence that the defendant negligently permitted any unsafe quantities of carbon monoxide to be present in the bus.

**2.**

The District Court erred in failing to grant appellant's motion at the close of all the evidence for the same reason as assigned in specification No. 1; and in failing to give appellant's proposed instruction No. 1 (R. 25):

> "You are instructed to return a verdict in favor of the defendant. In the event the foregoing instruction is denied, the defendant requests the following instructions."

**3.**

The District Court erred in failing to grant appellant's motion for judgment notwithstanding the verdict for the same reason as stated in specification No. 1.

**4.**

The District Court erred in submitting the issue of *res ipsa loquitur* to the jury upon the ground and for the reason that the appellee failed to introduce evidence sufficient to raise the presumption in question. Until there was evidence of quantities of carbon monoxide

sufficient to be a hazard to health in the bus, then there was no basis for any presumption that the presence of such gas in such quantities was caused by the negligence of appellant.

5.

The District Court erred in instructing the jury that the issues of contributory negligence, assumption of risk and mitigation of damages were withdrawn from their consideration (R. 1421, 1437), and further erred in failing to give defendant's proposed instructions Nos. 14, 15, 16, and 17 which read as follows (R. 35, et seq.):

"Instruction No. 14

'Contributory Negligence' is negligence on the part of the person injured which materially and proximately contributes to his injury. It may consist in doing some act which an ordinarily careful and prudent person would not have done under the same circumstances, or in failing to do something which a reasonably prudent person would have done under the same circumstances. If plaintiff was guilty of contributory negligence, she cannot recover, even though the defendant was guilty of negligence.

"The burden of proving contributory negligence rests upon the defendant.

"A paying passenger is required to use only that degree of care and prudence which a person of ordinary intelligence, care and prudence would exercise under the same circumstances."

"Instruction No. 15

You are instructed that plaintiff is not entitled to recover any damages in this case unless the plain-

tiff was free of any negligence on her part which proximately contributed to cause the alleged injuries of which she complains, if any. That is, you must find in order to authorize a recovery for the plaintiff that plaintiff was free of any failure to exercise due care for her own safety while in the bus, for our law requires that every person exercise reasonable care for his or her own safety where such failure to exercise such care proximately contributes to cause the accident.

"You are, therefore, instructed, that if you find in this case from a predonderance of the evidence that the plaintiff, Juanita Jean Blakley, was herself guilty of some negligence which materially and proximately contributed to cause her injuries, if any, then you are instructed that as a matter of law she cannot recover in this case and your verdict must be for the defendant whether or not you may also find that the defendant or its agents or employees are negligent.

"*Conradi vs. Arnold,* 34 Wn. (2d) 730."

"Instruction No. 16

You are instructed that a person in the position of Juanita Jean Blakley in this case did not have an absolute and unqualified right under all the circumstances to assume that the conditions in the bus were reasonably safe. She was bound to look out for her own safety and in so doing was required to use that degree of care which a reasonably prudent person of ordinary intelligence would use under the same or similar circumstances and if there were any obvious dangers it was her duty to take reasonable measures to avoid them.

"So, in this case, if you find that Juanita Jean Blakley failed to look out for her own safety, that is, failed to use that degree of care which a reasonably prudent and an ordinary and intelligent person would use under the same circumstances in which she found herself and such failure proxi-

mately contributed to the alleged injuries of which she complains, then you are instructed that she cannot recover in this action and your verdict must be for the defendant.

"*Smith vs. Mannings, Inc.*, 13 Wn. (2d) 573."

"Instruction No. 17

When one voluntarily and willingly places himself in a position of danger, he is presumed to assume all the risks reasonably to be apprehended. Thus, if the plaintiff in the exercise of ordinary care, knew or should have reasonably apprehended the risk of being exposed to carbon monoxide poisoning, if any, then if she failed to take ordinary or reasonable steps to protect herself, then you are instructed that she in law has assumed the risks inherent in the situation and your verdict should then be in favor of the defendants. No one in law is permitted to recover from another when with his own knowledge he assumes and subjects himself to a known risk."

(Exceptions stated R. 1456) upon the ground and for the reason that the jury could have found that the appellee had failed to exercise ordinary care to protect herself as others in the bus did and in remaining seated after the fumes were apparent to her, and in failing to take proper and prompt care of herself after the purported injury.

**6.**

The District Court erred in submitting to the jury the question of the driver's negligence inasmuch as the driver's negligence was not claimed in the pre-trial order and no amendment to that effect of the pre-trial order was had. Further, upon the ground that there was no evidence nor reasonable inference from the evi-

dence to establish that the bus driver was guilty of negligence (R. 1442) (Exception R. 1457).

7.

The District Court erred in failing to grant a new trial upon the grounds of excessive damages given under the influence of passion and prejudice upon the ground and for the reason that the evidence that the appellee was working up to a period shortly before the trial was not contradicted, and upon the evidence that her separation from such employment was not due to any medical history, and upon the evidence that those living with her found her to be a normal person, all of which evidence was not contradicted directly, the verdict appearing to be based largely upon the fact that the plaintiff was an extremely attractive person, fell in the courtroom several times (without hurting herself) together with a vivid presentation in the courtroom of the loss of reflexes, which condition, as stated above, existed prior to the bus ride in question.

## SUMMARY OF ARGUMENT

The evidence of the appellee failed to establish dangerous or hazardous quantities of carbon monoxide in the bus at the time in question. The sole and uncontradicted evidence was to the effect that any person can stand an exposure of from 400 to 500 parts per million of carbon monoxide for over an hour without any after effects (R. 887, 916) (Ex. 63). This evidence is not re-

futed. The evidence of appellant established that there was less than ten parts per million of carbon monoxide which appellee's doctors admitted could do no harm (R. 1148-1149). The only witness for the plaintiff, a Mr. West, testified that one foot from the exhaust pipe in the direct blast of the exhaust there was only 266 parts per million, well within the tolerance above specified (R. 462). Therefore, according to the uncontradicted testimony on both sides, plaintiff had not been exposed for a sufficiently long time to have resulted in any after effects, dangerous or otherwise. The verdict of the jury was thus wholly inconsistent with this evidence. Therefore, defendant's motion at the close of plaintiff's case, defendant's motion at the close of all the evidence and the defendant's motion for judgment N. O. V. should have been granted.

The court found that the doctrine of *res ipsa loquitur* applied and permitted the case to go to the jury upon that theory, when in truth and in fact said theory was not applicable in such a case as the case at bar. There was no evidence by the plaintiff of carbon monoxide in the bus. Therefore, there was no basis for the existence of the presumption of negligence in permitting carbon monoxide to be in the bus in the absence of evidence that there was carbon monoxide in the bus.

Error in law occurred in instructing the jury that the issues of contributory negligence, assumption of risk, and failure to mitigate damages were withdrawn

from the jury, and similarly, the court's failure to give defendant's proposed instructions Nos. 14, 15, 16, and 17 upon the ground and for the reason that the jury could have found that the plaintiff had failed to exercise ordinary care to protect herself as others in the bus did and in remaining seated after the fumes were apparent to her as her own witnesses testified. These issues were removed from the consideration of the jury over appellant's objection. Certainly, appellant was entitled to have these issues considered by the jury. There was evidence concerning same.

There was no contention in the pre-trial order that the driver of the bus was guilty of negligence. There was no testimony throughout the plaintiff's case in chief directed toward any negligence on the part of the bus driver. In fact, Mr. Wheaton, one of plaintiff's principal witnesses, testified that the bus driver did everything that he could do. Mr. Wheaton had been qualified as an expert on buses. There was simply no evidence of anything that the bus driver did or did not do which would constitute negligence. He stopped as promptly as he could after a complaint of fumes, and provided ambulance and hospital service as soon as possible out of an over abundance of caution. It should be borne in mind that the other passengers complained of the delay, rather than the fumes.

Finally the verdict was so large as to be unmistakably the result of passion and prejudice.

## ARGUMENT

### I.

### FAILURE OF PROOF

We wish to discuss first the problem pertaining to the failure of proof with respect to carbon monoxide. We will discuss here specifications of error Nos. 1, 2 and 3.

It was the contention of the appellee as stated in the pre-trial order that while riding on the bus of appellant from Spokane to Colfax she was exposed to carbon monoxide, received a dangerous amount thereof, resulting in the destruction of brain cells causing an epileptic condition (R. 11).

Let us detail here the circumstances: Miss Blakley, on November 20, 1955, was a girl 18 years of age, graduated the preceding June from high school with honors, attaining membership in National Thespian Honorary, active and popular in her school.

Juanita entered Washington State College that fall, pledging the Chi Omega sorority where she was a very popular girl. As many students do upon entering college, she had some difficulty with her grades during the first semester, but upon better adjustment her grades improved somewhat, but certainly did not lessen during the second semester (Ex. 79). On November 19, 1956, the University of Washington was playing Washington State College at football in the stadium at

Seattle. Juanita called her mother and asked for permission to go to this game. Her mother asked her not to go. Instead, she left Pullman Friday after school, traveling with her friend, Karen Gilbertson, to Spokane. Upon arrival in Spokane she stayed at the home of her sorority sister for a few hours, then met some other friends and stayed at their home over the weekend, meeting her sorority sister shortly before time to depart on the bus back to Pullman (R. 75). Although the bus was on time that night it was delayed an hour in Spokane to meet the incoming bus from Seattle, carrying other students who had gone to attend the game. The bus was fully loaded as it departed for Pullman with its ultimate destination Lewiston, Idaho. Within a few miles after leaving the depot, some of the passengers (R. 77, 117) noticed fumes in the bus, but did not tell the driver until the bus was approaching Cashup, a short distance from Colfax, about an hour later, when one of the girls sitting in the rear of the bus went forward to the driver and told him that there were fumes in the rear of the bus (R. 1092, 100). The highway was a narrow highway with no turnouts and as the law of the State of Washington prohibits parking on the travel portion of the highway, the bus driver drove a short distance (two or three minutes) to the cross roads known as Cashup (R. 1093). Pulling off the highway as far as he could he permitted some of the girls to get out of the bus, the plaintiff being one of them (R. 1094). He then checked the bus, noticed that there were

some fumes in the bus, but they were so dilute he could not see them, opened some of the windows, and suggested that the girls stay forward in the bus. The girls however returned to the rear of the bus, but shortly thereafter two of them came forward and finally the plaintiff came forward (R. 120). The girls had been smoking in the rear of the bus, and noticing that Miss Blakley seemed to be somewhat overcome, one of the passengers near the front permitted her to take a seat. Actually the fumes were so light several of the passengers riding in the rear of the bus failed to observe anything whatsoever. For example, Mr. James Whitman testified (R. 1167):

"Q. Mr. Whitman, were you on this bus that left Spokane on the night of November 20, 1955?

A. Yes, I was.***

Q. Where did you sit in the bus?

A. In the rear.***

Q. You were traveling alone. Did you see any fumes in the bus?

A. No, I did not.

Q. I beg your pardon?

A. I did not.***

Q. I see. Did you smell any fumes in the bus, Mr. Whitman?

A. No.

Q. Did you hear the girls in the back seat complain or talk about fumes?

A. Yes.***

Q. Well, what did they do and what did they say?

A. They giggled a good deal and complained about the fumes, held handkerchiefs to their nose eventually, and what not.*** I looked about me, I didn't detect any fumes.

Q. Did the fumes there have any effect on you?

A. None whatsoever.

Q. Were they irritating to your eyes?

A. No (1410).

Q. To your nose?

A. No.

Q. Did they give you a stomach ache or nausea?

A. No, they didn't."

The witnesses for the plaintiff testified at the trial that the fumes in the bus were noticeable at the outskirts of Spokane. Nothing was done by any of them for about an hour (R. 1092-3). One of the principal witnesses for the plaintiff was Patricia Murphy. She testified (R. 117):

"Q. Did you observe anything on the trip, while you were riding—what experience did you have?

A. Well, I smelled the gas fumes and became nauseated."

"Q. When did you first smell those, Miss Murphy?

A. I first noticed them around the city limits of Spokane.

Q. Where?

A. Around the city limits of Spokane.

Q. What did you do about it?

A. I just sat there.

Q. How long did you sit there?

A. Oh, for 25 minutes, around there.***

Q. Did you stop at Rosalia?

A. Yes; we did.

Q. Had Karen and Jean gone up to the front up to the time you stopped at Rosalia?

A. No; I don't believe they had.

Q. What did you do at Rosalia?

A. We got out of the bus.

Q. Then what did you do?

A. We got back in the bus.

Q. Well, you remained there for a few minutes, did you?

A. Yes.

Q. At that time, where did you continue to (96) sit?

A. I stayed in the front of the bus.

Q. Where did the girls go?

A. They went to the back."

Another witness, Mrs. Howard Engle, who was also a passenger on the bus in question testified (R. 1175 et seq) :

"Q. Do you recall whether or not there were any fumes, gas fumes, in the bus?

A. I didn't notice any.

Q. Did you hear that other girls were complaining about the gas fumes?

A. Yes.

Q. Did those girls, when they got back on, sit opposite you on the bus?

A. The first time we stopped, they didn't. The second time we stopped, Miss Blakley sat in the opposite—in the seat across the aisle next to the window.***

A. She apparently was having a bit of difficulty breathing. I felt that it was more hysteria.

Mr. Tonkoff: I move that that be stricken.

The Court: Yes, that will be stricken and the jury instructed to disregard it, the opinion."

It is apparent from the foregoing that the fumes were not particularly dense in the bus because when the bus stopped only three of the girls got off and these were the three in the rear of the bus. Other passengers did not feel that the fumes were sufficiently bad to get out of the bus. Likewise, none of the other girls had any residual effects. Some of the passengers did not even notice the fumes. The appellee, Miss Blakley, of course, became ill on the bus. Upon arrival at Colfax, approximately an hour and fifteen minutes after leaving Spokane, the bus driver pulled up at the fire station where he knew there was an ambulance and had Miss Blakley taken to the hospital out of an abundance of caution. She was examined there by Dr. William Freeman, who had practiced in Colfax for a period of twelve years, and was licensed to practice in the States of Washington, Idaho and Minnesota. He had graduated from Rush Medical College, Chicago, interning at Cook County Hospital, Chicago, where he had had consider-

able experience with carbon monoxide poisoning. He testified as follows (R. 966 et seq):

"A. Well, as I recall, they said that she had been overcome with gas fumes from the bus.

Q. Did you then treat her?

A. Yes, I did.***

Q. Doctor, did you diagnose her condition?

A. Yes, I did.

Q. What was your diagnosis?

A. Well, the tentative diagnosis when she came in the hospital was hysteria, and we kept in mind—we usually put to rule out carbon monoxide poisoning, so we keep it in mind. The working diagnosis was the same as the tentative diagnosis, and the final diagnosis was put down on discharge as hysteria.***

Q. (By Mr. Hawkins): Doctor, outside of this part that has been deleted, is that the hospital record that was made at the time Jeannie Blakley was in the hospital?

A. Yes.

Q. Is that your handwriting? I notice your signature at the bottom.

A. Yes.

Q. And the tentative diagnosis is what?

A. Hysteria and 'R.O'—that means rule out—'CO,' carbon monoxide poisoning.

Q. And at the bottom or final diagnosis?

A. Hysteria.

Q. Doctor, I believe you said you were at Cook County Hospital?

A. Yes.

Q. Did you have any experience in carbon monoxide while you were at Cook County?

A. Yes, quite a bit of experience."

The following morning Miss Blakley was discharged as cured and returned to her college work. It was not until some time afterwards that the symptoms appeared upon which she bases her claim for the damages that were returned by the jury in this case.

One of appellee's witnesses and a sorority sister, Rita Anderson by name, testified as follows (R. 150):

"Q. After this incident in November, 1955, can you tell the members of the jury here her general condition and her health as you observed it?

A. Well, not right afterwards. But—oh, say, a few weeks or a month later she started having headaches***."

Her condition certainly must have been mild as she was never taken to the infirmary nor was a doctor ever called to the sorority (R. 160):

"Q. Did you report her condition to the infirmary?

A. I did not.

Q. Is there an infirmary at WSC?

A. Yes, sir.

Q. It is a little hospital, is it not?

A. That is right.

Q. There is a doctor, there?

A. Yes, sir.

Q. And there are nurses there?

A. Yes, sir.

Q. The purpose of that infirmary is that if anybody gets sick, they are taken to the infirmary, are they not?

A. Yes, sir.

Q. Girls from your house have been taken to the infirmary, have they not?

A. Yes, sir.

Q. Do you know whether Jean was ever taken to the infirmary—Juanita Blakley, the plaintiff in this case? (148)

A. Not to my knowledge.

Q. You were very close to her, you testified?

A. Yes, sir.***

Q. You studied together?

A. We did.

Q. You went out on dates together?

A. We did.

Q. Do you know whether she was in the hospital or not?

A. No, sir; I don't.

Q. Don't you think that if she had been in the hospital you would know about it?

A. Yes.

Q. As I understand your testimony on direct, immediately following November 20th, you didn't notice anything particularly different about Juanita?

A. No.

Q. I think you testified it wasn't until May you first (149) noticed that something was wrong?

A. No, sir. I said she didn't faint until May.***

Q. Did you tell her to go and see a doctor?

A. No, sir.

Q. Did you report it to the house mother?

A. No, sir.

Q. Did you take her to the infirmary whenever she had any of these terrible headaches?

A. No, sir."

After leaving the Colfax hospital on November 21, 1955, the appellee did not again see a doctor until she was home during the Christmas holidays of 1955. But this was at her lawyer's request, and not for treatment. She was examined by Dr. Jack D. Freund, who testified as follows (R. 1131 et seq) :

"A. I saw Juanita or Jean Blakley once. (1366)

Q. And when was that, Doctor?

A. It was December the 28th, 1955.

Q. December 28th, 1955?

A. Yes.

Q. What was the reason that she came to see you, do you know?

A. I examined her at the request of an attorney.

Q. Who was the attorney?

A. John Westland.

Q. And were you told to look for any specific thing, Doctor?

A. I was told that she had been in a bus and they were suspicious of carbon monoxide poisoning.***

Q. What did your examination reveal to you, Doctor? (1367)

A. The only thing that I found deviating from the normal, that the reflexes of her lower legs, the patella, the knee reflexes, I felt were a little weaker than normal.

Q. Did she have any trouble with her balance, Doctor, when she walked?

A. Her gait was normal.

Q. Did she have any trouble with her speech? Was she hesitant at all?

A. I didn't notice any, and in my conversation with her she answered all the questions and told the story.

Q. Did she tell you the story about the ride on the bus?

A. Yes.***

Q. All right. Did you prescribe anything for her, Dr. Freund?

A. No, I was only to examine her, not treat her.***

Q. Doctor, just one question. Did you find or make a diagnosis of carbon monoxide poisoning?

A. No, I didn't.

Q. Did you report that to Mr. Westland?

A. I reported that my findings were normal."

Miss Blakley, the appellee, did not see another doctor until she saw Dr. Robert H. Southcombe of Spokane, Washington, a psychiatrist. Miss Blakley did not go to him until the 7th day of May, 1956, in his office in Spokane. Dr. Southcombe testified (R. 708):

"Q. In order to make a diagnosis of carbon monoxide poisoning, wouldn't it be important to know whether or not there was any appreciable concentration of carbon monoxide in the bus?***

A. That is true. But the responsibility of a physician—when a patient comes to him and gives a history, if he is going to go out and check every little detail, there is going to be very little work done in the doctor's office. (853)

Q. How about checking with the doctor who has treated the patient?

A. The patient wasn't referred to me by any physician.

Q. Your first contact was by Mr. Westland?

A. This patient was referred to me by Mr. Westland.***

Q. You have diagnosed this case to be a case of petit mal caused by acute carbon monoxide poisoning, have you not?

A. I again refer to the fact that my diagnosis was an organic encephalopathy manifesting itself clinically by petit mal attacks.

Q. Caused by carbon monoxide poisoning?

A. That is right.

Q. The reason you attribute it to carbon monoxide poisoning is because of the history—that is, the story—that you got from the mother and from the daughter, (851) that she had been riding on this bus?

A. That is correct.***

Q. Do you know what the carbon monoxide content of Diesel exhaust is?

A. No, sir; I don't."

The foregoing, we submit, is a summary of the essential evidence upon which the appellee's case rested below.

The entire basis of appellee's case thus is that since a doctor six months later diagnosed her case as being

petit mal epilepsy caused by carbon monoxide poisoning and since there were fumes in the bus that therefore appellant was guilty of negligence in permitting excessive quantities of CO to be in the atmosphere of the bus during the ride in question. This is a non sequitur. Notwithstanding the fact that no other passenger suffered any such effects, notwithstanding that there was no evidence of carbon monoxide gas on the bus, notwithstanding the fact that the fumes were not sufficiently bad to drive the passengers off the bus, and in several instances so thin and unnoticeable that several on the bus were not even able to detect the presence of such fumes, yet the jury was permitted to hold the appellant responsible.

It is to be borne in mind that the bus in question was powered by a General Motors diesel engine. It is to be borne in mind that a diesel engine emits only minor insignificant traces of carbon monoxide gas. It is to be borne in mind that a diesel engine does not put out 5 to 10% carbon monoxide as does a gasoline engine, but only insignificant traces. Virtually every day in the newspapers there are stories of people sitting in a parked automobile with the engine running, becoming asphyxiated, overcome, and in some instances killed by carbon monoxide gas. What evidence is there in the record that Miss Blakley did not receive a dangerous exposure at some other time or some other place and from some other source? If in fact she had CO poisoning.

Diesel engines have universally been used in mines and in submarines (until the advent of atomic power) strictly for the reason that the diesel engine does not generate dangerous quantities of carbon monoxide gas. Appellee's experts always assumed over 500 parts per million of carbon monoxide gas in the air of the bus. There was never any evidence of such quantity. The experts for the appellant uniformly established that there was less than ten parts per million of carbon monoxide in the bus, even with the back seat off, the plate to the engine compartment removed, and the seal broken, and with the exhaust manifold gasket partially removed (R. 1149). As a matter of fact, as the record shows, several runs were made with this particular bus and with similar buses under conditions far more extreme than existed on the bus in question on November 20, 1955 (R. 1095). These tests uniformly showed that there was less than 10 parts per million of carbon monoxide with the exhaust manifold gasket removed, the plate and seal and seat removed from the bus and the testing device just a few inches from the exhaust manifold itself (R. 898, 901) (Exs. 65, 66 and 74).

It is therefore apparent that the case against appellant upon the proposition of negligence and causation is based entirely upon assumption and is entirely unsupported by any substantial evidence in the case.

Although, as is shown by the testimony of Dr. Southcombe quoted above, Miss Blakley's condition may be

described as petit mal, the conclusion that her "condition" was "caused" by carbon monoxide is as the Doctor states, based upon heresay, namely the history given by the mother and the lawyer. The bare fact that an injury has happened cannot of itself justify an inference that the injury was caused by the defendant. This principle is well established in *Pacific Coast R. Co. vs. American Mail Line*, 172 Pac. (2d) 226, 25 Wn. (2d) 809. In that case the court stated, page 817:

> "Generally speaking, the mere fact that an injury has been sustained does not of itself, apart from the causative factors, create a presumption of negligence. *Anderson v. Harrison*, 4 Wn. (2d) 265, 103 P. (2d) 320."

See also *Prentice vs. United Pacific Insurance Company*, 106 P. (2d) 314, 5 Wn. (2d) 144, where the court said, pps. 163 and 164:

> " " ' "Proof which goes no further than to show an injury could have occurred in an alleged way, does not warrant the conclusion that it did so occur, where from the same proof the injury can with equal probability be attributed to some other cause."
>
> " " '***As a theory of causation, a conjecture is simply an explanation consistent *with known facts or conditions*, but not deducible from them as a reasonable inference. There may be two or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any one of them, they remain conjectures only.***' " "

It is a case of indulging in a presumption in order to support a conjecture. Presumptions may not be pyramided upon presumptions, nor inference upon infer-

ence. *Johnson v. Western Express Co.*, 107 Wash. 339, 181 Pac. 693; *Mumma v. Brewster*, 174 Wash. 112, 24 P. (2d) 438.

> " "We will infer a consequence from an established circumstance. We will not infer a circumstance when no more than a possibility is shown." " *Parmelee v. Chicago, M. & St. P. R. Co.*, 92 Wash. 185, 194, 158 Pac. 977, 981."

See also *Home Insurance Company vs. Northern Pacific Railway Company*, 18 Wn. (2d) 798, 140 P. (2d) 507, at page 803:

> "The appellant contends that, as babbit bearings are more likely to wear and become hot than roller bearings and, hence, create a greater hazard, and since the fire originated in the boot, the overheating of the bearings must have been the cause of the fire. It seems to us, however, that what was said by this court in the *Prentice case, supra*, p. 162, is applicable here:"

See also *Gardner vs. Seymour*, 27 Wn. (2d) 802, 180 P. 564, where the Supreme Court of the State of Washington stated, page 810:

> "***It is not sufficient that they be consistent merely with that theory, for that may be true, and yet they may have no tendency to prove the theory. This is the well settled rule.' It seems to us that we may reasonably draw other conclusions as to the cause of this injury from the facts in evidence than those contended for by the plaintiff."

To the same effect is *Johanson vs. King County*, 7 Wn. (2d) 111, 109 P. (2d) 307, and *Dobbin vs. Pacific Coast Coal Company*, 25 Wn. (2d) 190, 70 P. (2d) 642.

The jury had the right to find that on May 7, 1956, from the testimony of Dr. Southcombe, the plaintiff was afflicted with petit mal, but there was no evidence upon which to base a finding that there was any carbon monoxide of dangerous quantities or in any quantity in any way injurious in the bus. Not being able to make that finding, then obviously, there could be no finding that the appellant negligently permitted a dangerous quantity of carbon monoxide in the bus. Defendant's challenge to the sufficiency of the evidence and its motion for non-suit and dismissal at the close of plaintiff's case, and the defendant's motion at the end of all of the testimony and defendant's motion for judgment notwithstanding the verdict, or either of them, should therefore have been granted.

## II.

## RES IPSA LOQUITUR

Under this heading are discussed specifications of error Nos. 1, 2, 3 and 4. The trial court submitted the case to the jury on the theory of *Res Ipsa Loquitur* (R. 820). It is the appellant's theory that the facts of this case do not give rise to the presumption of negligence under the doctrine of *Res Ipsa Loquitur*. This presumption is discussed at considerable length in the case of *Pacific Coast R. R. Co. vs. American Mail Line*, 172 P. (2d) 226, 25 Wn. (2d) 809. In that case the defendant's boat struck a scow which was tied to a dock,

crushing the dock. In refusing to apply the doctrine of *Res Ipsa Loquitur,* the Supreme Court of the State of Washington stated, page 819:

> "In the case of *McClellan v. Schwartz,* 97 Wash. 417, 166 Pac. 783, this court, speaking through Chadwick, J., considered at some length the application of the doctrine of *res ipsa loquitur* to an action for personal injury brought by one who was injured on the business premises of the defendant. The court said:
>
> 'Because of the circumstantial character of the testimony, the doctrine is applied sparingly. *Anderson v. McCarthy Dry Goods Co., supra.* Hence it has been held that one charged under the doctrine of *res ipsa loquitur* is not to be put to his proof unless there is some *showing* of *cause*—careless construction, lack of inspection, or misuser. The cause of the accident—*the offending instrumentality*—must be identified before one charged is put to answer."

In other words, applied to the facts here, the offending instrumentality, to-wit, carbon monoxide, must be shown to have been on the bus before the doctrine of *Res Ipsa Loquitur* applies.

The court there continues, Page 819:

> "***The court held, just as it was held in *Cole v. Spokane Gas & Fuel Co.,* 66 Wash. 393, 119 Pac. 831, that it is a *showing of facts* sufficient to sustain a presumption of negligence, and not the *fact of injury,* that *sets the doctrine in motion.****"
>
> " " 'There can be no recovery on the ground of *res ipsa loquitur,* where there was nothing to show what caused the iron to slip and no proof of negligence; since it was necessary for plaintiff to show that it was caused by defective machinery or some extraordinary or negligent act under the control of the defendant.' " "

No one testified either on behalf of appellee or appellant's witnesses that any of the trifling things found wrong with the bus, the torn panel, the loose outside access panel to the motor at the rear of the bus, or anything else caused dangerous quantities of carbon monoxide to get into the bus.

In this connection an interesting case is *Wellons vs. Wiley*, 24 Wn. (2d) 543, 166 Pac. (2d) 852. There the Supreme Court of the State of Washington quoted with approval the following language of the Supreme Court of Wisconsin, page 550:

> "The court held that the burden rested upon the plaintiff affirmatively to prove negligence, and that:
>
> 'While the inferences allowed by the rule or doctrine of *res ipsa loquitur* constitute such proof, it is only where the circumstances leave no room for a different presumption that the maxim applies. When it is shown that the accident might have happened as the result of one of two causes, the reason for the rule fails and it cannot be invoked. *Quass v. Milwaukee G. L. (Gaslight) Co.*, 168 Wis. 575, 170 N. W. 942.' "

If the condition of "petit mal" is connected with the ride in the bus only by conjecture, and not by reasonable inference from the facts and circumstances, then the doctrine of *res ipsa loquitur* is not applicable and the appellee should not recover. Such is the case here. See *Hufferd vs. Sisovitch*, 290 P. (2d) 709, 47 Wn. (2d) 905, where the court stated, page 908:

> "Negligence is not to be assumed from the fact that there was a fire. Negligence causing a fire

must be established by direct evidence or by a legitimate inference from the established facts and circumstances, *i. e.*, circumstantial evidence. *Cambro Co. v. Snook* (1953) 43 Wn. (2d) 609, 262 P. (2d) 767.

"To determine whether the doctrine of *res ipsa loquitur* is applicable, the trier of the facts must recognize a distinction between what is mere conjecture and what is reasonable inference from the facts and circumstances. *Home Ins. Co. v. Northern Pac. R. Co.* (1943), 18 Wn. 798, 140 P. (2d) 507, 147 A.L.R. 849; *Cambro Co. v. Snook, supra.*"

As pointed out by the principles of the cases cited above, it is not incumbent upon the appellant (assuming the jury accepted the testimony of Dr. Southcombe that six months later he found that the plaintiff suffered petit mal from carbon monoxide poisoning) to assume the burden of proving that appellee was exposed to carbon monoxide at some other time, such as while parking at night in a car with the motor running, as the District Court ruled (R. 816). Rather the burden is upon the appellee to establish that there was carbon monoxide in dangerous quantities in the atmosphere of the bus. It is an essential link in the chain of appellee's argument. Had there been proof of this, then there would be some basis for the application of the doctrine of *res ipsa loquitur.*

In the absence of proof of that fact, the doctrine does not apply just as in the case of the barrel of flour falling out the second story window of the warehouse. If there is no barrel of flour, there is no room for the application of the doctrine of *res ipsa loquitur.*

The court therefore erred in submitting to the jury the issue of res ipsa loquitur and erred in failing to grant the defendant's motion at the close of the plaintiff's case.

## III.

## THE QUESTION OF CONTRIBUTORY NEGLIGENCE, ASSUMPTION OF RISK AND MITIGATION OF DAMAGES

Under this heading we will discuss specifications of error No. 5. The pleadings and pre-trial order which supplanted the pleadings in this case raised the issues of contributory negligence, assumption of risk and mitigation of damages. At the close of the case, the appellee moved to withdraw these three issues from the jury. This motion was granted over objection of appellant and specific instructions were given by the court, specifically withdrawing these issues from the consideration of the jury. The court also refused to give appellant's proposed instruction on these issues (R. 1456).

It is the position of appellant that the withdrawal of any one of these issues constituted prejudicial error. Concerning mitigation of damages, it is a rather startling fact, but nevertheless true, that it was almost ten months after the bus ride in question before the plaintiff received any treatment for her alleged injuries (R. 666, 691, 696). Her first visit to Dr. Freund, as he

stated, was not for the purpose of treatment, but for examination (R. 1133). Again, her trip to see Dr. Southcombe in Spokane in May, 1956, was not for the purpose of treatment, but for examination at the request of the attorney (R. 708). This examination was originally for the purpose of trying to compel appellant to pay the Colfax Hospital bill, which the appellant had previously declined to do on the basis that something other than the ride on the bus was the cause of the plaintiff's trouble since no one else on the bus had to be taken to a hospital or suffered any consequences.

It was after Dr. Southcombe had examined her the second time that he decided that treatment was in order. In this connection the Doctor stated (R. 694 et seq):

"Q. Doctor, would you go over again the drugs you prescribed for Miss Blakley?

A. Yes, sir; I first prescribed Mysoline. (837)

Q. What does that do?

A. Mysoline is an anti-convulsant drug.***

A. I certainly would feel derelict if I had a patient who had a convulsant electro-encephalogram and I didn't prescribe it.

Q. You prescribed it for what reason?

A. I prescribed it to reduce the irritability of the cerebral cortex.***

Q. What was the other drug that you prescribed?

A. Phenobarbital.

Q. That is an anti-convulsant?

A. That is an anti-convulsant. As a matter of fact, it is one of the early and best-known anti-convulsants.***

Q. When did you prescribe that?

A. I think I prescribed that sometime after June, 1956.***

Q. You saw Miss Blakley in May, 1956; and you saw her again in June, 1956. When did you see her again after that?

A. I saw her in November, '56.

Q. From June to November. When did you see her again after November, 1956?

A. June of '57.***

Q. In other words, you have seen her twice within the last year? (839)

A. That is correct.

Q. Then why do you say she should be examined by a doctor once a month?

A. I thought I made it clear that when anyone is using a substance as toxic and as treacherous as Tridione which is a notorious drug which could produce destruction of the white cells, it is the responsibility of the physician to protect his patient from the drug as well as the disease.

Q. When did you prescribe Tridione?

A. I don't recall whether it was November or June; and then I raised it.

Q. I beg your pardon?

A. I say I don't recall whether I initially prescribed Tridione in November or June, but I subsequently raised the amount."

It would seem obvious that the trier of the fact if allowed to consider the fact of mitigation of damages might well have found that had Miss Blakley gone to

the doctor more often or had she gone more promptly, she would not have been in the condition she appeared to be in during the trial. Not only does the evidence of Dr. Southcombe, plaintiff's own doctor, support this theory, but also the evidence of appellant's medical experts that epilepsy is a condition that can be controlled by the use of modern medicine and that one afflicted by such need not exhibit the classic signs of epilepsy, namely the symptoms of dramatic convulsive attacks.

This omission of the mitigation of damages might well have resulted in a substantially smaller verdict. Therefore, failure to submit that issue constituted prejudicial error, entitling appellant to a new trial.

With respect to the issue of contributory negligence and assumption of risk, we believe the appellant has even a much stronger position. Your Honors will recall that Miss Blakley sat in the rear of the bus with several girls. Your Honors will recall that those who noticed fumes began noticing them shortly after leaving Spokane and that Miss Blakley was one of those. Nevertheless neither she nor any of the other girls complained to the driver until three-quarters of the way to Pullman just shortly before they got to Colfax. Even then they took no steps to protect themselves, not moving forward until later (R. 1175).

Your Honors will recall that after some of the passengers noticed the fumes some of them opened their windows shortly after leaving Spokane and some dis-

tance before the bus driver actually stopped the bus. *If* the fumes were as bad as some of plaintiff's witnesses made them out to be at the time of the trial, Miss Blakley was obviously negligent in failing to protect herself and in failing to do so after noticing the fumes, she obviously assumed the risk. You cannot deliberately stay under water without assuming the risk of drowning. On the record in this case, the jury was entitled to find that Miss Blakley either negligently contributed to her situation by failing to take immediate steps to protect herself or assumed the risk thereof.

In *French v. Chase*, 48 Wn. (2d) 825, 297 P. (2d) 235, the trial court had withdrawn the issue of contributory negligence. The Supreme Court reversed the trial court on this point, stating, page 830, 831:

> "By instruction No. 3, the court directed the jury to disregard the defense of contributory negligence and, by so doing, decided that the minds of reasonable men could not reach different conclusions from the evidence. *Beck v. Dye*, 200 Wash. 1, 92 P. (2d) 1113, 127 A.L.R. 1022 (1939); *Billingsley v. Rovig-Temple Co.*, 16 Wn. (2d) 202, 133 P. (2d) 265 (1943); *Roloff v. Bailey*, 46 Wn. (2d) 358, 281, P. (2d) 462 (1955).
>
> "(5) There was conflicting evidence on the question of imminent peril, that is, whether there was an emergency requiring immediate action. Likewise, there was a question for the jury as to whether the situation, as it was presented, necessitated the extreme physical exertion employed by the respondent in effecting the rescue.
>
> "In the light of the evidence, it is our opinion that the minds of reasonable men could have differed in

determining these questions. The issue of contributory negligence with reference thereto should have been submitted to the jury."

In *Wines vs. Engineer's Limited Pipeline Company,* 151 Wash. Dec. 446, the court said, page 451:

"***only in rare instances is the court warranted in withdrawing the issue of contributory negligence from the jury."

In *Berndt vs. Pacific Transport Co.* 38 Wn. (2d) 760, 231 P. (2d) 643, the Supreme Court of the State of Washington stated, pages 765-766:

"In *McQuillan v. Seattle,* 10 Wash. 464, 38 Pac. 1119, this court said:

" 'Generally the question of contributory negligence is for the jury to determine from all the facts and circumstances of the particular case, and it is only in rare cases that the court is justified in withdrawing it from the jury. (Citing cases and authorities.)

" 'There are two classes of cases in which the question of negligence may be determined by the court as a conclusion of law, . . . The first is where the circumstances of the case are such that the standard of duty is fixed, and the measure of duty defiined, by law, and is the same under all circumstances. (Citing cases.) And the second is where the facts are undisputed and but one reasonable inference can be drawn from them. (Citing authorities.) If different results might be honestly reached by different minds then negligence is not a question of law, but one of fact for the jury.'

"This case has been repeatedly cited in our opinions and by courts of other jurisdictions.

"In 10 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. ed.) 510, sec. 6594, the rule is stated as follows:

" 'Where the nature and attributes of the act relied upon to show negligence constituting a proximate cause of the injury complained of can only be clearly determined by considering all the attending and surrounding circumstances of the transaction in question, it falls within the province of the jury to pass upon the character of such circumstances . . .

" 'If the evidence on the question of negligence is conflicting or such that reasonable men can draw different conclusions therefrom, the question is one for the jury. The court will not decide it as a matter of law, except under the clearest circumstances. But what amounts to due care and negligence depends upon the circumstances of each particular case.'

"In the case of *Hadley v. Simpson*, 9 Wn. (2d) 541, 115 P. (2d) 675, this court, speaking through Blake, J., said:

" 'The questions of contributory negligence and negligence are so interrelated that the former usually cannot be determined without reference to the latter. (Citing cases.) It is for this reason that this court has frequently said that, in negligence cases, the facts make the law. By the same token, decided cases afford little help in determining the issue.'

"The recent cases of *Discargar v. Seattle*, 25 Wn. (2d) 306, 171 P. (2d) 205, and *Mitchell v. Rogers*, 37 Wn. (2d) 630, 225 P. (2d) 1074, are also in point.

"(3) From the record, it clearly appears that the evidence presented several disputed questions for the jury to decide."

Since some of the people moved forward or opened windows before Miss Blakley did, there obviously was room for reasonable minds to differ as to whether or not she should have moved forward sooner for her own protection and therefore was guilty of contributory negligence or assumption of risk in failing to do so.

Therefore, the court's failure to give appellant's proposed Instructions submitting the issues of contributory negligence, assumption of risk and mitigation of damages constituted prejudicial error.

## IV.

## EXCESSIVE VERDICT

It is respectfully submitted to the court that the extremely high verdict in this case (one of the largest ever returned in a personal injury action in the Southern Division of the Eastern District Court) could have been returned only as a result of sympathy toward plaintiff constituting passion and prejudice. The plaintiff was and is a beautiful girl with an attractive personality. There is a picture of her in one of the exhibits (Ex. 5) taken and published not too long before the trial and we invite Your Honors' inspection. In the first place it is significant that very few, if any, disinterested observers ever witnessed one of the so-called attacks. Both Dr. Southcombe and Dr. Hood admitted that they had seen or observed none. Likewise, she did not experience any while under observation for several days at the Virginia Mason Clinic in Seattle. Not only did the doctors who examined her for the defendant, including Dr. Hale Haven, one of the foremost neurologists and neurosurgeons in the State of Washington, who failed to find anything significant in her E.E.G. or his examination of her and attempted to demonstrate

with her that there was nothing much wrong with her, but ran into considerable difficulty with counsel and the court (R. 1009, 1010, 1024, 1027-29, 1038-39).

Not only did Dr. Freeman of Colfax, Dr. Freund in Kennewick, and Dr. Haven with the Virginia Mason Clinic in Seattle fail to find anything but normalcy, but it is also significant that others who were quite close to her failed to observe anything out of the ordinary. Emma Lou Hoover testified as follows (R. 1047-56 et seq):

"Q. Do you know Jeannie Blakley?

A. Yes.***

Q. When did you first meet her?

A. Late June of 1956.***

Q. Did you later arrange for the two of you girls to live together in a home?

A. Yes, we did.

Q. Where was that home?

A. In Bauer-Day Housing. The address was 2101 Dallas.***

Q. How did this arrangement come about? How did you girls happen to live together?

A. Well, we talked about it for, I would say, about a month, and I don't actually remember whether it was my idea or Jean's idea. It was just sort of a mutual agreement.***

Q. Did Jeannie ever state to you why she was leaving her folks' place and moving in with you? (1267)

A. Well, the way I understood it then is that she had never lived away from her parents other

than just a few months in college and she kind of wanted to strike out on her own to live there.***

Q. (By Mr. Hawkins) Then you girls lived together from about the 1st of December, 1956, until about the 1st of May, 1957, this last May?

A. Yes, sir.***

Q. Did you see her in the mornings?

A. Oh, yes, sir, I woke her up.

Q. And did you see her in the evenings?

A. Yes.***

Q. During that time, did Jeannie drive an automobile?

A. She did when we first moved in. It seems to me she did after that, I can't remember exactly.

Q. Did she have a car of her own at that time?

A. When we first moved into the house, she was buying a car from her parents.

Q. She was buying a car from her folks?

A. Yes, sir.***

Q. How, then, during the time that you were together in the house, did you ever see Jeannie have an attack of fainting or collapse, anything of that kind? Did you see that?

A. No.

Q. And during all that time from about the 1st of December to the 1st of May, 1957, you saw her practically every morning and every evening?

A. I would say almost, yes.

Q. And during all of that time, you never saw Jeannie collapse and fall?

A. No, sir.

Q. Or faint?

A. No.***

Q. Did she say anything about her driver's license with respect to this lawsuit?

A. Just that she was going to give it up because if she had it, it wouldn't look so good.***

Q. (By Mr. Hawkins) : Now, what about Jeannie's activities during the months that you were living with her? Was she sick a lot or was she normal, or how would you describe it?

A. As normal. She had headaches once in awhile. She didn't seem restricted.***

Q. Did she go dancing?

A. Yes, sir.

Q. And how would you describe her insofar as dancing was concerned?

A. She was a good dancer, very good.

Q. Did she have any trouble with stability at all when she was dancing? (1271)

A. No, she was exceptionally good jitterbugging.

Q. Do you know whether she went sking last winter?

A. Yes, sir, I went with her one Saturday and I knew she went several times after that.***

Q. (By Mr. Hawkins) : Now, did Mrs. Blakley come and check on Jeannie?

A. And check on Jeannie?

Q. Yes.

A. No.

Q. Well, how often did Mrs. Blakley come to your home?

A. Not very often. My parents didn't come very often, (1272) either. We had a housewarming about two weeks after we moved into the house and,

of course, they were there then, and I would say they were there perhaps four or five, six times.

Q. Did they tell you that you should watch out for Jeannie?

A. No.***

Q. (By Mr. Hawkins) : Now, Jeannie held down a job during that time that she lived with you?

A. Yes, sir.

Q. And how did she enjoy her work?

A. Oh, she seemed to, yes.

Q. Did she put in any overtime that you know of?

A. Yes, sir, she worked on Saturdays occasionally.***

Q. Do you know why she gave the car back to her folks? (1273)

A. Well—***

Q. Did Jeannie say anything?

A. We couldn't afford it—she couldn't afford it.***

Q. Then you drove down to Pendleton, got there at 2 in the morning, and drove back to Richland, stayed there an hour, and drove on to Spokane?

A. Yes, sir.

Q. And then you shopped all day?

A. Yes.

Q. Jeannie was with you?

A. Yes, sir."

Walta Lee Hoover testified as follows (R. 1074 et seq.) :

"Q. Now, your sister had a home of her own in Richland part of the time?

A. Yes, sir.

Q. And Jeannie lived with her?

A. Yes.***

Q. How often did you go there?

A. Well, I spent nearly every week end with them while they were living there.

Q. Did you observe whether Jeannie was normal or not?

Mr. Tonkoff: Well, now that is objected to, your Honor.

Q. (By Mr. Hawkins): Tell us—

The Court: Yes, I think that calls for a conclusion.

Q. (By Mr. Hawkins): What did Jeannie do? Did she do anything out of the ordinary?

A. No, sir.

Q. Did she carry on a conversation?

A. Yes.

Q. Did she have trouble remembering things?

A. No.

Q. Did she go to dances?

A. Yes.

Q. How was she as a dancer?

A. Very good. I envied her.

Q. Beg your pardon?

A. Very good, I envied her.

Q. Was she unstable on her feet?

A. Oh, no. (1299)

Q. Did you ever see her fall or collapse?

A. No.

Q. Did you ever see her faint?

A. No.***

Q. And who drove the car that you picked up back?

A. Jeannie drove back.

Q. Did you ride with her?

A. Yes, I was in the back seat part of the time sleeping and part of the time awake.

Q. And Jeannie drove all the way from Pendleton to Richland?

A. Yes, sir.

Q. And what time of day was it that you left Pendleton?

A. Oh, we left shortly after we got there. We got in between 2:30 and 3, I would say at the latest 3:30 in the morning.

Q. In the morning?

A. Yes, sir.

Q. And then she drove back to Richland? (1300)

A. Yes, sir.

Q. Did you go to Spokane with them?

A. No, I didn't. I was quite tired so I went to bed.

Q. You stayed in Richland?

A. Yes, I did.

Q. And then she and your sister went on to Spokane?

A. Yes.***

Q. ***What kind of dancing did Jeannie do?

A. Well, ballroom dancing and then she did bop and jitterbugged.

Q. How was she at that?

A. Well, to me, she seemed very good. I don't bop or jitterbug myself so I really couldn't say she was very good or average.

Q. You actually saw her dancing yourself?

A. Yes.

Q. And did she have any trouble with her balance?

A. Not that I noticed.

Q. Did Jeannie ever tell you that she was planning on getting married?

A. Yes, sir.

Q. And who was she planning on getting married to?

A. Don Croft.***

Q. Do you know what he is doing, or did Jeannie tell you what he is doing?

A. Studying psychiatry, I think."

Mary Louise Fulseth, a sorority sister, and her roommate, testified as follows (R. 1195 et seq.):

Q. What sorority did you belong to, Mary Lou? (1443)

A. Chi Omega.

Q. Was that the sorority Miss Blakley was a member of, or had been pledged to, I should say?

A. Yes, it was.***

Q. Did you room with her at any time after November of 1955?

A. Yes, I did.

Q. And how long a time did you room with her?

A. Approximately two—approximately a month and a half to two months.

Q. When was this?

A. It was from the semester, which was approximately the end of January 1st to February, to spring vacation or shortly after that, just right around there.***

Q. And you occupied the same room at that time? (1444)

A. Yes, I did. There were four of us.***

Q. Now, during the time that you were with Jeannie, did you ever observe a fainting spell yourself?

A. I did not observe one."

It is also significant that the clinical findings of the lack of knee reflexes, the lack of attention or inability to concentrate and fainting or dizzy spells (so heavily relied on by appellee and her doctors) are the very things that show up in Exhibits 54 and 55, the information taken by the examining doctor on her admission to W.S.C., and *before the bus ride in question!*

Even Joann Hodges, one of plaintiff's strongest witnesses, testified as follows (R. 175):

Q. In May of 1956?

A. Yes.

Q. Was that the first time that you had seen Jeannie faint?

A. Yes.

Q. As I understand it, you did not report that to the House Mother?

A. No.

Q. Did you advise Jeannie to go to the infirmary?

A. It was not my place to advise her.***

Q. Was Jeannie moved to the infirmary, at that time?

A. Not to my knowledge. (168)

Q. You were there?

A. I was there.***

Q. Did she go out on dates very often?

A. Yes.***

Q. Did she go to dances after November, 1955?

A. Yes; I imagine.

Q. Did she complain to you of headaches after November, 1955?

A. Yes.

Q. Did you report that to anyone?

A. The Senior Member.

Q. Did you tell Jeannie that she ought to go to the infirmary?

A. No.

Q. Did you tell her she ought to go and see a doctor?

A. Not to my knowledge. I don't remember if I told her (169) that or not."

Even Noreen Anderson, who was one of the more aggressive witnesses for the plaintiff, testified as follows (R. 200):

"Q. To your knowledge, was Jeannie ever taken to the infirmary at WSC?

A. Not to my knowledge, no.

Q. Was she ever taken to the doctor at the infirmary or was the doctor at the infirmary ever taken to the house to see her?

A. Not to my knowledge, no.

Q. Did Jeannie ever complain to you as to what was wrong with her?

A. I knew she wasn't feeling well. She complained of the fact she was having difficulty when she was studying. But she never came right out and told me what was the difficulty."

Counsel made much of the fact, or claimed fact, that she was unable to concentrate and related this to the incident on the bus (R. 201). The truth is Miss Blakley herself complained of her inability to concentrate, dizziness, and hyporeflexia in September when being admitted to the college. See Exhibits 54 and 55, where these things are specifically mentioned.

In view of this mass of evidence (and the record is replete with much more) that there was little if anything wrong with Miss Blakley, except what she had complained of before the bus ride, it is apparent that the verdict of the jury was unmistakeably the result of passion and prejudice and was definitely contrary to the weight of the evidence.

In this connection we would also call your Honors' attention to the pathetic picture painted by counsel's examination of Miss Blakley in which she could hardly remember even going to college (R. 792-3):

"Q. Do you remember when you went to college?

A. I know I went to college.***

Q. Do you remember?

A. I don't know what I remember, and what people have told me I think I remember, but I am not sure.

Q. Do you remember your wanting to go to the football game in November, 1955; do you remember that?

A. No, sir.

Q. Do you remember going to Spokane on November 19, 1955?

A. No, I don't.***

Q. Do you remember being in the hospital overnight at Colfax?

A. No.

Q. Well, Jeannie, can you tell us the first thing that you can remember? Now, try hard. Do you remember somebody picking you up on the streets in Colfax on the morning of November 21, 1955?

A. No.

Q. Do you remember somebody taking you back to school on November 21, 1955?

A. No."

And so on.

Compare this with the separation report prepared by one of her immediate superiors, Exhibits 56, 57 and 58, (R. 857-80), in which it is stated that the reason for separation from General Electric was that she "will attend legal proceedings involving personal injury, later to be married and move from area." "Enjoyed work very much." Compare this also, with a letter which she wrote in her own handwriting (R. 809) just shortly before the trial to General Electric which reads in full as follows (Ex. 51) (R. 810):

"Kennewick, Washington, October 7, 1957. Personnel Office, General Electric Company, Richland, Washington.

"Gentlemen: I have been informed in regard to my release as an employee of General Electric, that the termination papers state that I was released for 'legal procedure and forthcoming marriage.' I can't understand why legal proceedings should have anything to do with my termination as long as the proceedings do not involve General Electric. As for getting married, I have hopes like every young girl but hope alone does not accomplish the fact.

"When I went to work for the company, I did not know of any permanent physical disability. It later developed that I had a permanent impairment from carbon monoxide poisoning. This injury resulted (977) in fainting spells and lapses of memory and consciousness. Therefore, I must admit my attendance record was very poor.

"When my condition became known to the Medical Division, I was asked to resign on three different occasions.

"To keep the records clear, I request that this letter be placed in my file to show that the true reasons for my termination was my medical history rather than the reasons given on my termination report.

Very truly yours,

Jeanne Blakley."

This letter, written in Miss Blakley's own handwriting, shows not only her disposition towards this particular case but also shows that there is nothing wrong with her mind. No atrophy! It is significant also that her immediate superior, who would actually know whether or not she suffered attacks while employed by G. E. during the year immediately before the trial was

not called by the plantiff, nor was his deposition taken. Rather than bring anyone who worked with her, one David Buel was called by the plaintiff who worked in the office next door. He testified as follows (R. 261):

"Q. How often did you see her, Mr. Buel?

A. Every day.

Q. For a period of almost a year—about a year, there?

A. Pretty close to a year, yes.

Q. In your own words will you tell the members of the jury here, what you saw about this girl, physically?

A. When?

Q. During the time you saw her at work, there; you said you saw her every day?

A. When she was hired, she was a very good worker and did a good job. Later on she tended to be more absent from (274) the job—later on.

Q. Did you notice anything about her demeanor when she was working or during the lunch hour; did you see her during lunch hour or at any other time?

A. No. I ate lunch with the men, during the lunch hour.

Q. Did you see her in the office?

A. During the lunch hour?

Q. At any other time did you notice anything unusual about her?

A. No, except that every now and then she would say she wasn't feeling so good or something like that. This was later on during her employment period.

(As the trial drew closer.)

Again on cross-examination, on page 264:

Q. Mr. Buel, what kind of work did Jeannie do, during this last year when she was employed by General Electric?

A. She was secretary to the manager of the Employee Communications Operation.

Q. She was secretary to the manager of that department?

A. Yes.

Q. My question was: What kind of work did she do?

A. Typing and shorthand.

Q. Did you have occasion to observe whether or not she did a good job?

A. Yes. I thought that she generally did a good job. Once in awhile she might possibly—she apparently forgot something. But I just attributed it to overwork—not overwork, excuse me; just busyness.

Q. Just the usual thing that you would expect?

A. Once in awhile you get a little busier than usual.

Q. There was nothing abnormal about it?

A. About her work?

Q. Yes.

A. No."

Likewise, it is significant that Miss Blakley was not living at home, but was living in Richland with Emma Lou Hoover whose testimony has been set forth above.

It is simply impossible to believe that the amount of the verdict was not dictated unmistakeably by passion and prejudice. Not only is there no factual basis for the amount; but obviously it is against the great weight of the evidence. It is based entirely upon emotion.

## V.

## NEGLIGENCE OF THE DRIVER

The view that one of the issues of the case was whether or not the driver of the bus, Mr. Hamilton, had been negligent, did not appear until the District Court suggested it in connection with his ruling upon the motion of appellant made at the close of plantiff's case (R. 820). Prior to that time it had not been suggested in the pre-trial order or in the pleadings.

The appellee offered no evidence specifically that the driver was negligent. There was no testimony that he could have detected the fumes sooner than he did. There was no evidence that after being notified of the fumes he was on the highway an unreasonable length of time, or that he could have stopped or pulled off the highway sooner than he did. There was no evidence of anything that he should have done or anything that he should not have done to support the contention of negligence on his part. He drove directly to the fire station in Colfax, and arranged out of an over abundance of caution for hospitalization and medical attention for Miss Blakley. The fact that none of the others on the bus who were in-

terested in getting to their destinations suffered any consequences would seem to refute any contention of negligence. As a matter of fact, but most important, there was no standard of care established, nor was there any indication that the driver violated any standard of care. So far as we know, and we are sure that the record does not disclose otherwise, even counsel for plaintiff at no time contended that the driver was negligent. Therefore, it was erroneous to submit this issue to the jury as it is axiomatic that the jury should not be instructed upon an issue that is not before it, or upon an issue as to which the plaintiff has offered no evidence. *Rastelli v. Henry*, 131 P. 643, 73 Wn. 227. *National Bank of Commerce v. U. S.*, 224 Fed. 679. *Bailey v. Carver*, 319 P. (2d) 821, 51 Wn. (2d).

## CONCLUSION

It is respectfully submitted that the judgment below should be reversed with directions to enter a judgment of dismissal in favor of the defendant upon the ground and for the reason that there was no evidence of carbon monoxide in unsafe quantities in the atmosphere of the bus at the time in question. There being no proof, substantial or otherwise, of the existence of carbon monoxide within the bus, then it cannot be said that the defendant negligently permitted it to be in the atmosphere of the bus. In any event, there should be a new trial in this case as the District Court erroneously permitted the issue of *res ipsa loquitur* to go to the

jury, erroneously withdrew the issues of contributory negligence, assumption of risk and mitigation of damages, and in any event the verdict should be set aside as based unmistakeably on passion and prejudice and because of its excessiveness.

*Respectfully submitted,*
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*Attorney for Appellant*